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No. 93-723

Supreme Court
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA,

Petitioner,

vs.

X-CITEMENT VIDEO, INC. AND RUBIN GOTTESMAN,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION, COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS, FREEDOM TO READ FOUNDATION, INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, AND THE PERIODICAL AND BOOK ASSOCIATION OF AMERICA, INC. AS *AMICI CURIAE*

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STATEMENT

The American Booksellers Foundation for Free Expression, Council for Periodical Distributors Associations, Freedom to Read Foundation, International Periodical Distributors Association, and Periodical and Book Association of America, Inc. (together, "*amici*") submit this joint brief urging that the Court declare the proper *mens rea* scienter standard required to sustain a conviction under 18 U.S.C. § 2252(a)(2), and remand the case for consideration in light of such standard. *Amici* respectfully urge the Court to require that convictions under 18 U.S.C. § 2252(a)(2) be based upon proof that the defendant had actual knowledge that the visual work unlawfully depicted at least one person who was a minor.

Amici do not submit this brief in support of either party, but rather to aid the Court in its determination of the appropriate standard of knowledge required under § 2252 and to focus the attention of the Court on the potential serious and substantial harm that would be inflicted upon thousands of publishers, distributors and retailers of books, magazines and other visual materials if a less stringent *mens rea* standard were adopted by the Court. This brief is submitted upon the written consents of counsel to both petitioner and respondents, which are submitted herewith.

THE *AMICI*

The American Booksellers Foundation for Free Expression ("ABFFE") was organized in 1990. The purpose of ABFFE is to inform and to educate booksellers, other members of the book industry and the public about the dangers of censorship, and to promote and to protect the free expression of ideas, particularly freedom in the choice of reading materials.

The Council for Periodical Distributors Associations ("CPDA") is the national trade association for approximately 400 independent local wholesale distributors who distribute over ninety-five percent of all magazines, comic books, paperback books and newspapers in every state of the United States.

The Freedom to Read Foundation ("FTR") is a not-for-profit organization established in 1969 by the American Library Association to promote and defend First Amendment rights, to foster libraries as institutions that fulfill the promise of the First Amendment for every citizen, to support the right of libraries to include in their collections and make available to the public any work they may legally acquire, and to establish legal precedent for the freedom to read of all citizens.

The International Periodical Distributors Association ("IPDA") is the trade association for the principal national periodical distributors engaged in the business of distributing or arranging for the distribution of paperback books and periodicals to wholesalers throughout the United States for ultimate distribution to retailers and the public.

The Periodical and Book Association of America, Inc. ("PBAA") is an association of magazine and paperback book publishers who distribute magazines and books through independent national distributors, wholesalers and retailers throughout the United States and Canada, for ultimate sale to the public, principally at newsstands.

INTERESTS AND CONCERNS OF THE *AMICI*

This case poses the question whether a distributor of visual materials may be subject to criminal prosecution under the federal child pornography statute without actual knowledge that materials it distributed included unlawful depictions of minors. The court below struck as unconstitutional § 2252 of the Protection of Children Against Sexual Exploitation Act of 1977

(the "Act"), because it fails expressly to state as a statutory element knowledge of the minority of one of the subjects of the photograph. Before the Ninth Circuit, the government ultimately conceded, as *amici* here contend, that, to be constitutional, § 2252 requires proof that a defendant knew that materials depicted minors, *i.e.*, that they constituted child pornography. All the circuit courts considering the issue have reached the same conclusion. The dissenting judge below, relying principally on the Court's construction of an Ohio statute in *Osborne v. Ohio*, 495 U.S. 103 (1990), concluded that a distributor or seller of visual materials could be prosecuted for child pornography if it was "reckless" as to whether the material depicted a minor engaged in sexual conduct.

Amici's members distribute, sell and loan books, magazines, videos, works of art and printed materials of all types, including ones that are scholarly, literary, artistic, scientific and entertaining. They are the essential intermediaries between the creators and the consumers of artistic and literary materials. *Amici's* members do not own what are commonly referred to as adult retail stores; nor do they distribute the adult materials that are generally found in such stores. *Amici's* members do, however, distribute and sell mainstream materials that may include photographs or depictions of adults who may appear to be young, engaged in sexual conduct. Because *amici's* members include businesspeople who distribute, sell and loan popular and potentially provocative books, periodicals, art and video, *amici* have a significant interest in the resolution of the issue before the Court.

Sexual exploitation of children is properly denounced. Accordingly, otherwise constitutionally-protected visual images may be subject to criminal sanction if they involve minors. In this legal context, the subject's age may constitute the single factor separating child pornography from protected speech. To balance the policy protecting minors and the constitutionally-compelled presumption against restricting expressive activity, the United

States Constitution requires that distributors and sellers not be subject to criminal prosecution unless they knew they were handling materials depicting children engaged in sexual conduct. A standard that protects distributors who lack knowledge of the minority of the subject depicted affords mainstream distributors and sellers a clear and ascertainable test in order to conduct their businesses without inadvertent criminal exposure, while still sanctioning those who knowingly traffic in child pornography. Any lesser standard, including the "recklessness" standard proposed by the dissent below, fails to recognize the practical realities of the daily businesses of *amici's* members.

By the nature of their work, the members of *amici* are not the creators of the visual materials and generally have no direct contact with the models or persons photographed. Publishers receive material from authors, other publishers and agents. They in turn pass the work on to intermediaries, such as the members of IPDA and CPDA, who act as distributors and wholesalers. The distributors and wholesalers redistribute the works to retailers. Given the volume of materials involved, in most cases, these intermediaries do not look into or even at these works.

To comply with a standard that permits conviction absent actual knowledge, distributors would be forced to scrutinize each item they handle, whether in their inventory, in their catalogues or on their shelves, and to guess at the age of the subjects. They would be forced to predict whether they could be judged to have consciously disregarded a substantial risk that an actor in one of countless volumes of materials was a minor engaged in lascivious conduct. To prevent ruinous prosecutions, full-time censors would be needed to review each page of each book or magazine to assure that no images could be adjudged to give rise to that undefined risk. The identity of the fact-finder adds to the problem; a juror concerned about child pornography easily could accept the argument that it is reckless not to methodically review every volume or video in the face of a child

pornography allegation without fully appreciating the impact on legitimate businesses and on the free distribution of constitutionally protected visual materials.

The chilling effect of incorporating anything but a "knowing" standard thus becomes real and substantial. Even if distributors practically could undertake the enormous investment of the monitoring effort required by a lesser standard, they would still risk misguessing a performers' perceived age and would be forced to err on the side of restricting legally-protected materials depicting minors.

SUMMARY OF ARGUMENT

This appeal focuses the Court on the state of knowledge necessary to prove the key element that distinguishes protected visual materials from those subject to criminal prosecution as child pornography -- the age of the performer. Under the United States Constitution, visual images that are not obscene, and therefore are freely distributed, may be regulated only if they involve unlawful depictions of minors. This Court's prior rulings require scienter for a conviction of distribution of child pornography. All members of the panel below and all other courts of appeal faced with the issue agree that scienter must be proved before sanctioning speech.

Section 2252 proscribes "knowing" receipt or distribution, or "knowing" reproduction of visual depictions that meet the statutory requirements defining child pornography, but it does not clearly specify the level of scienter required with respect to the performer's age. As a matter of logic and statutory construction, it is impossible "knowingly" to receive, distribute or reproduce child pornography without also knowing that the materials depict minors. Reading § 2252 to require actual knowledge of the performer's minority is the only logical and constitutionally-appropriate standard for distributors and retailers who are not readily able to verify the ages of the individuals

depicted in the visual materials they trade, and who do not as a matter of course review or even open the materials they pass from creator to consumer. As a practical matter, they typically cannot conduct such a review because of volume and timeliness constraints. Such distributors and retailers should not be subject to criminal liability unless they distributed the materials with knowledge of the implications of their acts.

The vast majority of prior decisions have recognized that the "knowing" requirement of § 2252 applies to the entire statute and precludes prosecution absent proof that the defendant knew one of the performers was a minor. Construing § 2252 to require knowledge that materials involved a minor is not inconsistent with the recklessness standard accepted in *Osborne v. Ohio*, 495 U.S. 103 (1990). The Court there, construing an Ohio statute, did not have before it the question of the constitutionally-appropriate level of scienter in child pornography cases. In addition, the "recklessness" standard accepted in *Osborne* had been defined by the Ohio Supreme Court in a manner closer to "knowledge," *Ohio v. Young*, 525 N.E.2d 1363, 1369 (Ohio 1988), further supporting the "knowledge" requirement and demonstrating graphically the danger of endorsing a standard of "recklessness," a word of many and variant meanings.

The legislative history also supports a finding that § 2252 requires knowledge that the materials depicted minors. The floor debates expressly reflected Congress' intent that only sellers and distributors who were "consciously and deliberately engaged in the marketing of child pornography" would be subject to prosecution. The age of the performer is so crucial to the regulatory scheme that Congress could not have intended to proscribe "knowing" engagement in child pornography absent proof that a defendant knew the questioned materials contained depictions of minors.

Any other construction would wreak havoc on the businesses of distributors and sellers of mainstream materials on which consumers rely. It would create a chilling effect on the distribution of First Amendment-protected visual works, and would put mainstream distributors and retailers at risk of arrest without culpability. Mainstream distributors and retailers require some measure of certainty that they are not inadvertently operating in violation of the Act. Lower levels of scienter, including the recklessness standard proposed by the dissent below, fail to provide that certainty and inject variability by permitting, even requiring, distributors, retailers and librarians to inquire into the possibility that subjects depicted in visual materials they handled were minors engaged in sexual conduct. Given the difficulty of approximating any individual's age, a statute imposing criminal liability based on age must be narrowly drawn. The recklessness standard, itself subject to varying constructions and interpretations and involving subjective assessments of risk, is particularly ill-suited in this context, where the stakes are so high and a distributor, retailer or librarian could easily be penalized for having guessed wrong.

A distributor's, bookseller's or librarian's only alternative in attempting to comply with anything other than an actual knowledge standard would be to invest massive resources that nonetheless might not effectively insulate it from prosecution. Even if distributors, retailers or librarians could apply such resources, and even if it were possible to ascertain with some certainty whether they should have known a particular work portrayed a minor, such a standard would necessarily limit the scope of materials distributed by members of *amici* in their attempts to avoid unwitting criminal sanction.

ARGUMENT

I. ESTABLISHED PRECEDENT REQUIRES ACTUAL KNOWLEDGE OF A MINOR'S UNLAWFUL DEPICTION TO SUPPORT A CONVICTION UNDER § 2252.

A. Requiring Knowledge of the Subject's Age is Consistent with the Court's Prior Holdings.

This case marks the Court's first consideration of the *mens rea* required to prosecute distributors, booksellers or librarians under the federal statute proscribing child pornography. A construction that applies the "knowledge" requirement to each element of § 2252 is consistent with the Court's prior rulings in analogous contexts.

The Court first examined the scienter element of prosecutions for distribution of constitutionally unprotected sexually explicit material in *Smith v. California*, 361 U.S. 147 (1959). There, the Court considered the constitutionality of a municipal ordinance criminalizing booksellers' possession of obscene materials. The ordinance included no element of scienter. The Court recognized the need to prove knowledge of the nature of the materials, concluding that

> [b]y dispensing with any requirement of knowledge of the contents of the book on the part of the seller, the ordinance tends to impose a severe limitation on the public's access to constitutionally protected matter. ***For if the bookseller is criminally liable without knowledge of the contents, and the ordinance fulfills its purpose, he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction***

> ***upon the distribution of constitutionally protected as well as obscene literature.***

Id. at 153 (emphasis added) (footnotes omitted).

As the Court explicitly recognized in *New York v. Ferber*, 458 U.S. 747 (1982), the concern expressed in *Smith* for safeguarding free expression and the distribution of written materials applies to child pornography as well as obscenity cases. *See id.* at 765 ("As with obscenity laws, criminal responsibility [for child pornography] may not be imposed without some element of scienter on the part of the defendant."). Congress recognized and addressed in other parts of the Act the special harm to children associated with child pornography. For example, in contrast with the obscenity standard set forth in *Miller v. California*, 413 U.S. 15 (1973), the Act contains no inquiry into the serious literary, artistic, political or scientific value of a work, it permits prosecution of producers absent proof of scienter, and sets forth particular statutory criteria for prosecution. There is no evidence that Congress intended to lower the *mens rea* element to remedy the concerns already addressed in other portions of the Act.

Moreover, as Justice Brennan highlighted so well in *Smith*, imposing anything other than a "knowledge" standard would cause distributors to self-censor their speech more rigorously. Courts long have recognized the particular danger resulting from laws that create such a pressure. *See, e.g., Freedman v. Maryland*, 380 U.S. 51, 59 (1965); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 64 n.6 (1963).

Nor does the Court's opinion in *Osborne* compel anything other than a "knowledge" standard. There, the Court considered the constitutionality of a conviction for possession under the Ohio child pornography statute. The conviction was challenged on a variety of grounds, including whether a jury conviction based on strict liability violated due process or

whether it could stand under the "harmless error" rule. The issue of whether "recklessness" was a constitutionally-appropriate standard was not argued by the parties and was not before the Court. The Ohio Supreme Court upheld the statute's validity because it imported a recklessness scienter standard based on Ohio's "gapfiller" statute. *State v. Young*, 525 N.E.2d 1363, 1368 (Ohio 1988). While claiming to apply the statutory "recklessness" definition,[1] the Ohio Supreme Court expanded the definition of recklessness to have many of the aspects of actual knowledge:

> Implicit in this requirement is the necessity of proving that the defendant had some notice of the character of the material possessed. Our reading of the statute as a whole clearly indicates that only those who are on notice as to the illicit character of the material are subject to criminal penalties.

Id. at 1369. The salient policy underlying the regulation of child pornography is to prevent the harm to children associated with materials deemed to be child pornography. *See Ferber*, 458 U.S. at 756-760. By proscribing only "knowing" receipt, distribution or reproduction, the Court can further prosecutions of those who traffic in child pornography, while safeguarding protected visual materials and the businesses and libraries that distribute, sell and circulate them.

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[1] The Ohio statutory definition of recklessness was:

"A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist." Ohio Rev. Code 2901.22(C).

"Actual knowledge" does not require a defendant to know the precise age of the person depicted, or even to know as an independent fact that the person is a minor. Obviously, proof that the defendant actually had seen a sexually-explicit photograph of a nude pre-pubescent female or actually had seen a caption that identified the subjects in a sexually-explicit photograph as being 15 years of age would suffice. The test could be stated as whether defendant had such actual knowledge as would put a distributor on actual notice that it was dealing with child pornography.[2]

B. Both the Statutory Language And Congress' Clear Intent Also Support the Position that 18 U.S.C. § 2252 Requires Knowledge that Visual Materials Contained Depictions of Minors.

It is well-established that "[i]n determining the scope of a statute, we look first to its language." *Moskal v. United States*, 498 U.S. 103, 111 S. Ct. 461, 465 (1990). *Accord Pennsylvania Dep't of Pub. Welfare*, 495 U.S. 552, 110 S. Ct. 2126, 2130 (1990); *Mallard v. United States Dist. Court*, 490 U.S. 296, 300-01 (1989). Section 2252 proscribes "knowingly" receiving, distributing or reproducing materials satisfying the definition of child pornography. The statutory language itself thus identifies "knowledge," rather than any other scienter standard, as the requisite *mens rea* for prosecution under § 2252.

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[2] Nor can a child pornographer shield himself from liability by wilfully blinding himself to facts showing that he was dealing with child pornography. *See, e.g., United States v. Picciandra*, 788 F.2d 39, 46-47 (1st Cir.), *cert. denied*, 479 U.S. 847 (1986). In a child pornography case, facts evidencing conscious avoidance of facts indicating a defendant dealt with child pornography could support conviction; however, sexual explicitness alone would not be a sufficient trigger for criminal liability.

Read in text, it seems evident that "knowingly" should apply to each of the elements in the sentence. Given the fact that scienter is constitutionally required, one can presume that Congress intended the culpability standard it inserted early in each clause in § 2252 to apply wherever a culpability standard is required in that section, rather than some other, unstated, standard.

This position is supported by the legislative history. During the floor debate on the bill, Senator Percy stated that he assumed that the term "knowingly" in the proposed amendment meant that "the distributor or seller must have either, first, actual knowledge that the materials do contain child pornography depictions or, second, circumstances must be such that he should have had such actual knowledge, and that mere inadvertence or negligence would not alone be enough to render his actions unlawful." 123 Cong. Rec. 33,050 (1977). Senator Roth replied:

> That is absolutely correct. This amendment, limited as it is by the phrase "knowingly," insures that only those sellers and distributors who are consciously and deliberately engaged in the marketing of child pornography and thereby are actively contributing to the maintenance of this form of child abuse are subject to prosecution under this amendment.

Id.

Senator Percy then asked whether a bookseller could be prosecuted under § 2252 "if a book or magazine which happened to contain prohibited material is discovered in his shop." *Id.* Senator Roth responded that Section 2252 "creates no affirmative duty to inspect on the part of the distributor or seller, though it would certainly apply to one who actively and affirmatively endeavors to conceal his knowledge." *Id.* This exchange

between Senators Percy and Roth clearly shows that the word "knowingly" was meant to require knowledge on the defendant's part that he was trafficking in child pornography.

Congress deliberately omitted the use of the word "knowingly" in 28 U.S.C. § 2251, which proscribes the production of child pornography and which also was enacted as part of the Act. The Conference Committee report points out that the word was omitted from Section 2251 "with the intent that it is not a necessary element of a prosecution that the defendant knew the actual age of the child." S. Rep. No. 601, 95th Cong., 1st Sess. 5 (1977); H.R. Conf. Rep. No. 811, 95th Cong., 1st Sess. (1977). It follows that, in retaining the word "knowingly" in § 2252, Congress must have intended to include knowledge requirement.

C. Virtually All Courts Considering the Issue Have Concurred that the Act Requires Knowledge that Minors were Depicted.

Numerous courts have considered the very question presented here. Nearly without exception, those courts have concluded that the knowledge standard pronounced in § 2252 applies to the age of the subject as well as to the other statutory elements the statute requires. *See, e.g., United States v. Cochran*, No. 93-1578, 1994 U.S. App. LEXIS 2455, at * 12 (3d Cir. Feb. 2, 1994); *United States v. Edwards*, No. 92 Cr 884, 1993 WL 453461 at 5 (N.D. Ill. Nov. 4, 1993); *United States v. Prytz*, 822 F. Supp. 311, 320-21 (D.S.C. 1993); *United States v. Long*, 831 F. Supp. 582, 586 (W.D. Ky. 1993); *United States v. Maday*, CR-88-145E, 1989 WL 53023 at 3 (W.D.N.Y. May 18, 1989); *United States v. Sherin*, No. 86 Cr. 481, 1987 U.S. Dist.

LEXIS 458, at * 25 (S.D.N.Y. Jan. 28, 1987);[3] *see also United States v. Gifford*, No. 93-1645, 1994 U.S. App. LEXIS 3175, at * 31 (1st Cir. Feb. 24, 1994); *United States v. Duncan*, 896 F.2d 271, 278 (7th Cir. 1990).[4] Only one court stands with the dissent below in permitting prosecutions based on recklessness as to the performer's age, and that court merely adopted the dissenting opinion with little additional discussion. *See United States v. Kempton*, 826 F. Supp. 386, 388-89 (D. Kan. 1993).

The dissenting opinion below thus comprises the sole judicial discourse advocating a "recklessness" standard. Yet even that opinion notes that "[w]hich mental state to choose is not entirely clear." *United States v. X-Citement Video, Inc.*, 982 F.2d 1285, 1296 n.8 (9th Cir. 1992) (Kozinski, J., dissenting). The dissent selected the recklessness standard based on two factors which are not convincing: (1) the policy favoring the prosecution of those who traffic in child pornography, which would not be hampered by the "knowledge" standard; and (2) the Court's decision in *Osborne v. Ohio*, which, as discussed

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[3] Only two district court judges have stated that proof of knowledge of minority is not required. *See United States v. Kleiner*, 663 F. Supp. 43, 44-45 (S.D. Fla. 1987) (§ 2252 does not require proof of knowledge of victim's age); *United States v. Tolczeki*, 614 F. Supp. 1424, 1425-29 (N.D. Ohio 1985) (§ 2252 establishes *per se* rule).

[4] While some cases expressly require proof of the performer's minority, *see, e.g., United States v. Cochran*, No. 93-1578, 1994 U.S. App. LEXIS 2455 (3d Cir. Feb. 2, 1994); *United States v. Long*, 831 F. Supp. 582, 586 (W.D. Ky. 1993); *United States v. Sherin*, No. 86 Cr. 481, 1987 U.S. Dist. LEXIS 458 (S.D.N.Y. Jan. 28, 1987), others require that proof only implicitly, by requiring proof of the "nature and contents" of the materials, which should, by definition, require knowledge that minors are depicted. *See e.g., United States v. Edwards*, No. 92 Cr. 884, 1993 WL 453461 (N.D. Ill. Nov. 4, 1993); *United States v. Prytz*, 822 F. Supp. 311, 321 (D.S.C. 1993); *see also, United States v. Brown*, 862 F.2d 1033, 1037 (3d Cir. 1988) (§ 2252 requires specific knowledge as to the general category of unlawful items). To avoid unnecessary ambiguity, *amici* recommend that the Court read the statute expressly to require proof of the performer's minority.

above, does not clearly support that standard. By contrast, the "knowledge" standard comports with the overwhelming number of courts considering the issue, is consistent with the statutory language and legislative history, and is not contradicted by any binding or compelling reasoning.

II. ANY LESSER STANDARD WOULD IMPOSE UNWORKABLE RESTRICTIONS ON DISTRIBUTORS, RETAILERS AND LIBRARIANS, AND WOULD UNCONSTITUTIONALLY CHILL PROTECTED SPEECH.

A. The Recklessness Standard is Vague and Difficult to Apply.

Were the Court to adopt a "recklessness" standard, it would invite numerous and severe interpretive problems. The recklessness standard is both subject to divergent interpretations and itself involves subjective judgment that would pose problems for mainstream distributors, retailers and librarians such as *amici*.

The Model Penal Code defines the recklessness standard as follows:

> A person acts recklessly with respect to a material element of an offense when he ***consciously disregards a substantial and unjustifiable risk*** that the material element exists or will result from his conduct. The risk must be of such nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

ALI Model Penal Code Act, § 2.02(c) (1980) (emphasis added). Although many states follow the Model Penal Code approach, some of the modern codes employ different definitions. 1 Wayne R. LaFave and Austin W. Scott, Jr., *Substantive Criminal Law*, § 3.7, at 333 n.26 (1986). Nor have courts applied the term consistently. *Id.* at 326. Recklessness has been defined to include both "(a) conduct creating a higher degree of risk than is necessary for ordinary negligence and (b) a subjective awareness that the conduct creates such a risk;" however, sometimes "it is used simply to distinguish the requirement of subjective fault," and "sometimes it is defined to cover the inadvertent creation of a high degree of risk." *Id.* at 326 n.5. The manner in which the Ohio Supreme Court redefined recklessness in *Osborne* demonstrates this unwanted variability.[5] *See* pp. 9-10, *supra*. The uncertainty of the definition, as well as the subjective judgment it often involves, would create grave problems for the mainstream *amici* before this Court, who would not know what steps are required for compliance and whether they can practically be effectuated, forcing them to shy away from the distribution of constitutionally-protected materials.

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[5] Thus *amici* strenuously disagree with the statement by the United States that "it is not likely to make a difference in many cases whether the Court adopts a `knowledge' standard or a `recklessness' standard. . ." Petition for Cert., p. 11, n.4.

B. Any Standard Less Stringent than Actual Knowledge would have an Impermissible Chilling Effect on Distributors, Retailers and Librarians, who would be Forced to Unduly Restrict the Materials Available to the Reading and Viewing Public.

If the Court were to impose a standard of recklessness or some other diminished standard, wholesalers, distributors, retailers and librarians would face the impossible burden of combing through the vast quantity of material that nominally passes through their hands daily. A standard forcing those in the stream of commerce of visual communicative materials to examine every item from cover to cover or to proceed at their peril would constitute an overwhelming impediment on the distribution of First Amendment-protected materials by mainstream businesspeople.

A few facts highlight the problem. "Approximately 500,000 books are in print at any given time, and 50,000 new books are published every year." *American Booksellers' Ass'n v. Webb*, 643 F. Supp. 1546 (N.D. Ga. 1986), *rev'd on other grounds*, 919 F.2d 1493 (11th Cir. 1990). Approximately 3,500 periodical titles are published each year. A typical periodical distributor maintains an inventory of over 2000 different periodical titles, which appear weekly, bi-weekly, monthly or quarterly. Shipments are made to retailers no less than weekly. Retailers include grocery stores, convenience stores, drug stores and other establishments. Librarians similarly manage substantial volume of works daily. Over 200 public libraries sampled by the U.S. Department of Education in the fall of 1982 had collections of 300,000 works or more. Twelve percent, or over 1000, had collections of over 100,000 works.

In most cases, the distribution intermediaries do not look at the materials, but rather, allocate and deliver them. In many cases they do not even open individual boxes. Similar problems arise at the retail level. Many items arrive and are sold packaged; others of the thousands that are carried by a bookseller or other retailer are not individually reviewed. Librarians would be required to review the perceived ages of subjects depicted in any book, magazine or videotape they circulate.[6]

Nor can the practical impact be mitigated by selective review in "obvious" categories. Nude, semi-nude and suggestive clothing advertisements appear in all sorts of periodicals including the New Yorker, Mademoiselle, Glamour, Cosmopolitan, Self, Shape, or the New York Times Magazine; nudity may appear in general circulation periodicals such as Time, Newsweek, Vanity Fair, Vogue or Sports Illustrated, as well as Playboy or Penthouse; it is difficult to anticipate which videotapes are likely to contain images of minors in sexual conduct; and books of all sorts may include photo illustrations which, if of minors, could be considered by some to be child pornography.

An actual knowledge standard affords mainstream businesses and libraries involved in the distribution, sale and circulation of visual materials the ability to distribute legitimate materials free from concern for prosecution, absent a conscious decision to handle, or knowledge of handling, proscribed materials. Even Judge Kozinski, author of the dissenting opinion below, has recognized the dangers associated with establishing the scienter requirement for distributors:

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[6] As stated earlier, *amici* are not suggesting that knowingly blinding oneself to obvious facts constitutes exculpation. See n.2 *supra*.

> it would undoubtedly chill the distribution of books and films if sellers were burdened with learning not only the content of all of the materials they carry but also the ages of actors with whom they have had no direct contact. . . .

United States v. United States Dist. Court, 858 F.2d 534, 543 n.6 (9th Cir. 1988).

CONCLUSION

In order to properly balance the competing considerations of freedom of expression and protection of children, *amici* respectfully request this Court to draw the standard for prosecution under 18 U.S.C. § 2252 narrowly to avoid unnecessary ambiguity. Accordingly, *amici* respectfully request the Court to require proof of actual knowledge of the subject's minority and to remand the case for further proceedings consistent with that determination.

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